United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 2[illegible]8 0063

OSCAR AUSTIN, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Judgment of the United States
District Court for the District of Columbia

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(Appointed by This Court)

December 21, 1967

I N D E X

C I T A T I O N S

Cases: (Those cases principally relied upon are marked with an asterisk.)

Questions Presented

I. Whether the testimony of two friends is sufficient to sustain a conviction if the remainder of the evidence shows that it was inherently improbable--though not impossible--that the defendant committed the crime.

II. Whether the Trial Court erred in not permitting counsel for the defendant to subpoena Officer Baytop.

III. Whether the Trial Court erred in criticizing defense counsel, and in implying that he was inept, for injecting his "opinion" as to the conclusions to be drawn from the evidence, while permitting the prosecution to express its opinions freely.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21238

OSCAR AUSTIN, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

On Appeal from a Judgment of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant was tried and convicted in the United States District Court for the District of Columbia on a single count indictment charging robbery in violation of Section 22-2901 of the District of Columbia Code. By judgment dated July 28, 1967 appellant was sentenced generally to imprisonment for a period of three to nine years. On the same day the District Court granted appellant's application for leave to appeal in forma pauperis. This Court has jurisdiction under 28 U.S.C. §§1291 and 1294(1).

Statement of the Case

The government's case is substantially that developed in the 10-page section of the transcript of testimony between pages 15 and 25 inclusive. In essence it is that on March 9, 1966 at approximately 3:30 a.m. the defendant, Austin, held up the Gulf Service Station at 101 Massachusetts Avenue, N.W. Two witnesses, Folks, who worked at the gas station and his friend, Fields, testified that after lingering around the station for approximately 45 minutes the defendant came into the office of the service station where the two witnesses were sitting, threatened them with a gun and asked for money. Some $131.00, the proceeds from station business, were turned over. They both said the robber wore no mask; Folks testified that the robbery was committed by the same person whom he had seen on several previous occasions around the station. Both witnesses claimed the defendant was the man who robbed the station.

It is not entirely clear how the police learned the name of the defendant (the suggestion is made (TR 27) that identification was made at the police station by picture). In any event, a warrant was issued the following day for his arrest. Despite the fact that Austin met the manager of the gas station, Mr. Jesse Turner, on the street several times after the robbery (TR 92), Austin was not arrested until May 13, 1966, over two months later, in front of a theater. There is no suggestion that the defendant ever hid or had attempted to evade arrest in any way.

The defendant testified that he had frequented the gas station almost daily for a number of years and this was confirmed by the manager of the station, Jesse Turner, (TR 89). Austin's explanation for his whereabouts was that he had been asleep in his grandmother's rented room at the time of the robbery (see generally TR 106-120). He testified that he frequently had been around the station after March 9th, although this testimony was disputed by the manager, Mr. Turner. As indicated, Turner did testify that he had seen Austin twice after the robbery.

The defendant's grandmother testified that she recalled the defendant being in the room at about 9:00 on the evening of the robbery but that when the robbery was committed she had been asleep. She did testify, however (TR 99) that the defendant was "right there in the house with me all night" (TR 99) and that she did not sleep soundly (TR 105). The reason both Austin and his grandmother remembered the incidents of the day before was because, as they testified, a police officer called on the telephone the following day to ask whether the defendant had a gun. No followup call was made, and nearly two months elapsed before the defendant was arrested.

Statutes Involved

Section 22-2901 of the District of Columbia Code provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Statement of Points

I. The testimony of two friends is insufficient to sustain a conviction inasmuch as the remainder of the evidence shows that it was inherently improbable that the defendant committed the crime for which he was convicted.

II. The Trial Court erred in not permitting counsel for the defendant to subpoena officer Baytop.

III. The Trial Court erred in criticizing defense counsel, and in implying that he was inept, for injecting his "opinion" as to the conclusions to be drawn from the evidence, while permitting the prosecution to express its opinions freely.

Summary of Argument

The case against appellant rests in its entirety upon the testimony of two eyewitnesses: Folks, the station attendant, and his friend, Fields. Apart from their testimony there is nothing whatever to connect Austin with the crime. While ordinarily eyewitness testimony is, of course, sufficient to sustain a conviction, this is not the case where the other circumstances in the case make it inherently improbable that the defendant committed the crime. On the facts of this case, it is improbable that the defendant committed the crime, improbable to a degree that no reasonable man could fail to have reasonable doubts as to Austin's guilt.

The Trial Court refused to permit officer Baytop to be subpoenaed. The request was made so as to enable defense counsel to examine Baytop concerning certain police records which he wrote so as to find out if omissions in the records of much of the significant testimony of Folks and Fields were the result of their not relating immediately after the robbery things about which they later testified in court or resulted from officer Baytop's neglect in writing it down. Failure to grant counsel's request was reversible error.

Lastly, the Trial Court castigated the elderly (and appointed) defense counsel for expressing a very mild opinion in the course of final argument, suggesting that anyone in practice so long ought to know better. Yet in his final argument, counsel for the government frequently expressed opinions without censure. This obviously could have had a great impact on the mind of the jurors or some of them, and may have prevented a fair deliberation by them.

Argument

I. The testimony of two friends is insufficient to sustain a conviction inasmuch as the remainder of the evidence shows that it was inherently improbable that the defendant committed the crime for which he was convicted. (In connection with this point, appellant desires the Court to read particularly TR 21-22, 89 and 196.)

On the facts of record in this case, the jury could not reasonably have concluded that the defendant was guilty. In determining the sufficiency of the evidence in a criminal case, the test for a reviewing

court is "whether 'reasonable minds could find that the evidence excludes every hypothesis but that of guilt.'" Urquidi v. United States, 371 F. 2d 654 (9th Cir. 1967), citing Barnard v. United States, 342 F. 2d 309 (9th Cir. 1965). This standard is essentially that set forth in this Court's decision in Crawford v. United States, ____ App. D.C. ____, 375 F. 2d 332 (1967), where the standard on appellate review is whether a reasonable man could believe the defendant guilty beyond a reasonable doubt.

But even accepting that the standard by which the adequacy of the prosecution's case is judged is not the same for an appellate court as for the jury it is still evident that the government's case fails to meet even the lesser standard applicable to review proceedings. On the record here, it is evident that any reasonable man would have reasonable doubt as to the guilt of the defendant, Oscar Austin, Jr.

Two witnesses -- friends -- testified that it was Austin who robbed the station. Their testimony alone comprised the entire evidence against Austin. Yet whoever did commit the crime wore no mask, and made no attempt to conceal his identity. The manager of the station, Jesse Turner, testified that Austin had been in and around the gas station several times a week for six years (TR. 89). It is absurd to think that anyone whose grasp of reality is as good as Austin's evidently was, and is, would choose this of all places to rob. After the robbery Austin made no effort to leave town or to hide. In fact, Turner

testified that he, Turner, met him on the street on two subsequent occasions. In this connection, it is notable that evidently nothing extraordinary passed between Turner and the defendant -- Turner neither called a policeman nor became agitated; Austin neither ran nor attempted to hide.

The unreasonableness of such behavior is not affected by the fact that Folks was a new employee. Folks himself testified that he had seen the defendant three times before the robbery (TR 21) although he later changed this to twice (TR 23). He stated at TR 21 that the defendant was "in and out almost every day". He even remembered almost verbatim a conversation he and the defendant had relating to drinking (TR 22). Consequently, the suggestion by the prosecution that Austin had deliberately chosen a new employee who was unfamiliar (TR 196) is without merit.

Equally implausible is the suggestion by the Government that a shrewd robber will hold up a place where he is known so that he can use the inherent irrationality of this as a defense. (TR 196).

The prosecutor attempted to answer this argument in his rebuttal. He stated that it is common for people to hold up neighborhood stores where they are well known. In addition, he suggested that Austin might have shrewdly anticipated the defense of implausibility:

> "He holds up a place where he has been, and knows the people. And then if he's a shrewd robber, his attorney can come into court and say My God, what an unlikely place to hold up anyone. Why would a man like that hold up a place he knew?" (TR 196. Punctuation error in transcript corrected.)

These two arguments are, of course, basically contradictory. Moreover, neither reaches the real point. In the context of this case, it is plainly unreasonable to suppose that the defendant acting shrewdly would plan to commit the crime in the manner suggested, without a convincing alibi, since apprehension was certain. Nor, assuming arguendo that the defendant committed the crime, would this be a mere holdup of a neighborhood business. Austin was not merely from the neighborhood; he was a person who frequently went by the station, knew the manager and employees well, and was absolutely certain to be recognized by them. Only a person who wished to be caught and punished would do such a thing and Austin, while he never made any attempt to hide, obviously did not, and does not, wish to be convicted.

Appellant is mindful that this Court cannot reverse or set aside convictions simply because the defendant was known to the victim, and we are not asking that this be done. We are asking that this Court take cognizance of the unique factors in this case -- that Austin was well-known at the station, that he lacked a prepared alibi, that the police telephoned the next day (which can hardly have been invented by the Grandmother since if she was going to lie, she presumably would have chosen a more effective area of falsehood, such as that she had

seen Austin at 3:30 a.m. on March 9th) and that Austin did not flee during the long delay before arrest. We ask the Court to rule that the mere testimony of two friends, without some further corrorboration, is insufficient evidence on which to base a conviction in this case. If evidence of this sort can, by itself, put a man in jail, then none of us are safe, unless we are guilty and can prepare an excuse in advance. If we are asleep in our beds, what protection do we have against those who might claim -- for any reason -- that we committed a midnight crime?

In connection with this argument, our position is that the Trial Court should have ordered the entry of judgment for acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, since, even on that view of the evidence most favorable to the prosecution, no reasonable juror could fail to have reasonable doubts as to Austin's guilt. Beatrice Foods Co. v. United States, 312 F.2d 29, 40 (8th Cir. 1963).

II. The Trial Court Erred in Not Permitting Counsel for the Defendant to Subpoena Officer Baytop. (In connection with this point, appellant desires the Court to read particularly TR 78-85, 123-127 and 129-146.)

During the course of the trial, defendant's counsel, Mr. Ehrlich, repeatedly tried to show that a number of statements made by the witnesses had not been given to the investigating officers in the first instance. The implication would have been that the statements made during the trial were false, having been concocted after the event in

an effort to bolster their claims that Austin was the one who held up the gas station. The trial judge responded in two ways. First, he repeatedly belittled the aim of Mr. Ehrlich, by pointing out that the police statement was not supposed to contain all statements made by witnesses, but only enough to permit a lookout to be started. (TR 129 et seq.) Second, he refused to permit counsel to subpoena officer Baytop, who prepared the initial report, on the ground that there had been time to arrange for this earlier and that the trial must not be delayed. (TR 133). Failure to permit Officer Baytop to be subpoenaed was plain error, warranting reversal here.

It is obvious from the transcript that the defendant's principal defense was that the witnesses were either mistaken or lying. The defendant himself had not prepared any explanation of his whereabouts, except to say that he had been home sleeping. Consequently, it was of the utmost importance that the defense be able to show that the witnesses' testimony at trial was different from that given at the time of the offense. Counsel Ehrlich did not learn, despite evident diligence, that it was officer Baytop who had prepared the initial report until King testified at the trial. Without Baytop, no juror could tell whether the report was deficient because Baytop had not written down everything told to him, or whether it was deficient because the witnesses had not told him all the facts that they later related. All that any trier of fact could conclude from the police records introduced in evidence and read to the jury was that for some reason--unknown--most

of the events related at trial by Folks and Fields were not mentioned. This being the case, the records themselves could not possibly have had any effect on the jury. On the other hand, suppose Baytop had testified that he had questioned each witness at length and that neither had, at that time, mentioned key details present in their later testimony. This would have been so startling as to have precluded any reasonable juror from having in his mind the degree of certainty needed to vote in favor of a guilty verdict. Or suppose officer Baytop had testified that to his recollection, the witnesses had been unclear as to details which they later related with great particularity. Anyone reading the transcript must necessarily be impressed by the incredible amount of detail--including practically verbatim recollection of conversations, clothing, and the like--which these relatively uneducated witnesses, untrained in memorization, remembered over one year later in the course of their testimony. The point we make is simply that the witnesses appear to have gone over their story carefully -- the color of the gun is virtually the only point upon which there was any disagreement -- and provided details that may well have been supplied after the event; that if we are correct in this supposition, as well we might be, Officer Baytop's testimony would have discredited the testimony of the two witnesses; and that the only way to explore this possibility was to examine Officer Baytop.

This is not just a technical argument. Defendant Austin was convicted for one reason: the jury accepted the testimony of the two witnesses that it was Austin who held up the station. And this testimony was accepted for only one reason: there was no way (short of compelling the witnesses to recant, which rarely happens) for the testimony to be rendered unbelieveable without the testimony of someone who had heard either or both of the witnesses tell a substantially different story. The trial judge focused on what in his mind was a logical flaw in Ehrlich's position--that unless there was a statement in the police report contradictory to their testimony, neither the report nor the testimony of the man who prepared it was of any significant probative value. From the foregoing, it is obvious that the judge was wrong in this view, and that omissions could have been greatly significant, depending on the cause of the omissions. Indeed, at TR 145 counsel Ehrlich elicited the testimony from Sergeant-Detective King that the reports are supposed to "give all other details of offense". The ruling by the trial judge prohibiting Officer Baytop from being subpoenaed, and his general attitude concerning the direction that counsel Ehrlich was trying to pursue necessarily presumed that Officer Baytop had not followed the instructions. A presumption that a police officer did not follow instructions (when he himself gave no testimony on this subject) cannot be permitted to play -- as it clearly did here -- a material and significant role in the defendant's conviction.

But what about the fact that detective King testified that Folks told him that he had seen the defendant around the gas station. Does this make any testimony Baytop might have given irrelevant? The answer, of course, is no. King appears to have been an active participant in the prosecution. His memory may have been inaccurate, or his testimony affected by the wish to put an offender behind bars. Any substantial deviation between his testimony and Baytop's would doubtlessly have made an impression on the jury. This is not a plea for an endless succession of witnesses testifying generally as to the same subject matter, in the hope that one would furnish testimony inconsistent with the others. Only one officer was presented, and it was on his word alone that the jury had a chance to hear that the witnesses' story was to some extent at least a consistent one. Surely it was in order to permit the defense to bring in the other officer who actually prepared the report.

Moreover, the court was far too harsh on Mr. Ehrlich in castigating him for what it apparently thought was lack of diligence. Mr. Ehrlich was appointed to defend Austin, and it is only just that this Court take cognizance of the fact that any appointed lawyer cannot drop everything to work on appointed cases, since the fees are generally insufficient to repay spadework in depth. Further, Mr. Ehrlich is an elderly man, having practiced some 42 years. (TR 189). It is shocking, under these circumstances, to read of the trial judge <u>not even bothering to inquire how quickly Officer Baytop could be made available</u>.

III. The Trial Court Erred in Criticizing Defense Counsel, and in Implying that he was Inept, for Injecting his "Opinion" as to the Conclusions to be Drawn from the Evidence, while Permitting the Prosecution to Express its Opinions Freely. (In connection with this point, appellant desires the Court to read particularly Tr 189, 191 and 197.)

In the course of his closing argument, Mr. Ehrlich said (TR 189) "On the contrary, on the contrary, I believe that the evidence --" He got no further. The court proceeded to admonish him in terms that were intended to make him look foolish by suggesting that only a beginning and inept lawyer would make an attempt to express his opinion in a closing argument. The transcript at this point speaks for itself. Yet immediately afterwards, in the summation of government counsel, opinions are expressed freely: "I think that is an important consideration" (TR 191) ". . . after considering all of the evidence we think that evidence leads to the only fair and just conclusion." (TR 197) ("fair and just conclusion" referring, in the context of the statement made, to a verdict of guilty beyond a reasonable doubt.) The attitude of the Trial Court throughout the proceedings favored the prosecution, and there is little doubt from the transcript that the remarks of the judge referred to above may well have indicated to the jury how the judge thought they should decide the case. As this Court admonished in Young v. United States, 120 App. D.C. 312, 346 F. 2d 793, 797 (1965):

> "In short, while a judge is more than a mere moderator, care must be taken that a jury may not derive some untended meaning from the attitude and comments of the trial judge."

Moreover, under the circumstances, Mr. Ehrlich was plainly entitled to comment on the evidence. See United States v. Hoffa, 349 F. 2d 20, 51 (6th Cir. 1965), aff'd 385 U.S. 293 (1966).

Conclusion

For the reasons set forth above, the conviction of the defendant should be reversed, or, alternatively, the judgment below should be set aside and a new trial ordered.

Respectfully submitted,

STUART C. LAW

Attorney for Appellant
(Appointed by This Court)

December 21, 1967

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,238

OSCAR AUSTIN, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
CARL S. RAUH,
Assistant United States Attorneys.

Cr. No. 778-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Was the evidence sufficient to sustain the conviction for robbery, where (a) two witnesses unequivocally identified appellant as the armed bandit who robbed the gas station of $130, and (b) one of these witnesses had seen appellant on several occasions prior to the robbery?

2. Was appellant denied permission to subpoena Detective Baytop, where (a) appellant only requested that Detective Baytop be subpoenaed *if* the court would not allow him to introduce into evidence a report prepared by Detective Baytop and to argue to the jury about this report, and (b) the court allowed the report into evidence and allowed appellant's trial counsel to argue without restriction about the report?

3. Was it prejudicial error for the trial judge to admonish appellant's trial counsel during closing argument not to argue his personal opinions?

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied on are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,238

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Austin was charged with robbery in violation of 22 D.C. CODE § 2901 (1967). After trial before a jury and District Judge Hart on June 8 and 12, 1967, the jury returned a verdict of guilty as charged (Tr. 164). Appellant was sentenced to imprisonment for 3 to 9 years.

THE GOVERNMENT'S CASE

The testimony of Wiliie Marshall Folks

Willie Marshall Folks was working the 8:00 p.m. to 7:00 a.m. shift on March 8 and 9, 1966 at the Gulf Serv-

ice Station at 101 Massachusetts Avenue, Northwest, in the District of Columbia (Tr. 16). Folks was a new employee of Jessie Turner, the owner of the Gulf Service Station, and was the only employee on duty between 8:00 p.m. and 7:00 a.m. on March 8 and 9, 1966 (Tr. 16, 17, 20, 21). Although not an employee, one Robert Fields was also at the Gulf Service Station during this time (Tr. 17).

About 3:30 a.m. on March 9, 1966, appellant, wearing a black tweed coat with white checks, green pants and a black hat, entered the front office of the Gulf Service Station where Folks and Fields were sitting down talking (Tr. 18-19, 23). Folks asked appellant if he could help him and appellant said no (Tr. 18). Thereafter, appellant pulled out a pistol from his pocket and said to Folks, " 'Slim, you can be a live hero or a dead hero, it makes no difference to me' " (Tr. 19, 26). Appellant then told Folks to throw the money over and Folks threw to appellant about $130 in bills of Jessie Turner's money (Tr. 19-20, 26). Folks then reached in his pocket to give appellant the change and appellant said, " 'No, you keep that [the change] for a souvenir' " (Tr. 19, 26). At this point Fields began to stand up and appellant told him, " 'You sit down or I'll shoot hell out of you' " (Tr. 19, 27). Appellant then told Folks, " 'Place your hands up on the window and stay there until I leave' " (Tr. 19). Appellant then fled and Folks called the police (Tr. 19). The police came shortly thereafter (Tr. 35).

Folks positively identified appellant in court as the hold-up man (Tr. 24). During the week before the robbery, Folks had seen appellant three or four times hanging around the gas station and on one occasion appellant offered Folks a drink (Tr. 20-23). Appellant also had been hanging around the gas station during the early morning hours of March 9, 1966, and Folks had a conversation with appellant at the grease rack about 45 minutes prior to the robbery (Tr. 18, 20).

About 7:00 a.m. on March 9, 1966, Folks went down to police headquarters and gave a full report of the robbery to Detective King (Tr. 28-29, 31, 35). Folks reported to

Detective King at this time that $175 had been stolen, but later after Jessie Turner made a full inventory, it was determined that about $130 was taken (Tr. 29).[1]

The testimony of Robert Fields

Between 8:30 and 9:00 p.m. on March 8, 1966, Robert Fields, a friend of Folks, arrived at the Gulf Service Station at 101 Massachusetts Avenue, Northwest (Tr. 52, 59). Fields was there to try to learn the prices of the different goods sold at this gas station in hopes that he would be hired to work there (Tr. 52).[2] Fields had been there on several previous evenings for the same reason (Tr. 58-59).

About 3:30 a.m. on March 9, 1966, Folks and Fields were sitting inside the Gulf Service Station which was well lit (Tr. 53-54, 55). Appellant, wearing a heavy tweed coat, entered and with a pistol in his hand ordered Folks to throw over the money; appellant also told Folks he would be a dead hero (Tr. 54, 55, 61). Folks threw over the money to appellant but when Folks went to give appellant the change, appellant told Folks to keep the change (Tr. 54, 67). During the robbery Fields attempted to stand up, but appellant told Fields to sit down or he would "shoot the hell out of" him (Tr. 54, 56, 62). After appellant obtained the money, he fled (Tr. 57). Fields gave a full report of the robbery to Detective King (Tr. 63).

Fields identified appellant in court as the holdup man (Tr. 56). Although Fields had never seen appellant prior to the early morning hours of March 9, 1966, Fields did observe appellant hanging around the gas station for an hour or an hour-and-a-half prior to the robbery (Tr. 53,

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[1] At the end of Folks' direct examination, the prosecutor turned over to appellant Folks' statement to the Grand Jury clerk (marked as Government Exhibit A) and the Metropolitan Police Department Form 163 (marked as Government Exhibit B) (Tr. 24-25).

[2] Fields actually began working at this gas station as an employee about a week after the robbery (Tr. 52-53).

55, 60). Appellant was not wearing a mask when he robbed the gas station (Tr. 55).

The testimony of Detective Sergeant Glenn A. Hilton

Detective Sergeant Glenn A. Hilton, Robbery Squad, Metropolitan Police Department, arrested appellant at 11:50 p.m. on May 13, 1966 at 6th Street and Florida Avenue, Northwest, in the District of Columbia (Tr. 69-70). Appellant's arrest was based on an arrest warrant issued on March 9, 1966 (Tr. 70).

APPELLANT'S DEFENSE

The alleged friendship between appellant and Jessie Turner

Jessie Turner, the owner of the Gulf Service Station at 101 Massachusetts Avenue, Northwest, testified that he was well-acquainted with appellant since appellant frequently visited the gas station (Tr. 87-89). Turner saw appellant only twice since the March 9, 1966 robbery and on one of these occasions Turner did talk with appellant (Tr. 90). On maybe two dozen occasions over a period of years, Turner had loaned appellant small sums of money which was always less than a dollar (Tr. 89-90).

On cross-examination, Turner testified that appellant was not a friend of his (Tr. 92). Turner also testified that appellant stopped coming to the gas station from March 9 to May, 1966 (Tr. 92). However, between March 9 and May, 1966 Turner had passed appellant twice on the street (Tr. 92). The prosecutor then asked Turner why he had loaned appellant money (Tr. 92-93). Turner began to answer the question but was interrupted by the trial judge who *sua sponte* called a bench conference (Tr. 93). At the bench conference the prosecutor stated that Turner would testify that he loaned appellant money because he had heard from other business proprietor's in the area that if he did not give appellant small sums of money, appellant might cause him trouble (Tr. 93-94). The court refused to allow the Government to bring this out and therefore told the jury to disregard the testimony

regarding Turner's loans of small sums of money to appellant (Tr. 94).

The Alibi

Mrs. Nellie Smith, appellant's grandmother, testified in appellant's behalf (Tr. 95-106). Mrs. Smith testified that she went to bed at 9:00 p.m. on March 8, 1966 in her room at 1610 H Street, Southeast, and appellant, who had been sleeping in this room for a couple of weeks, was there reading at the time she went to bed; appellant was fully dressed at the time (Tr. 97, 103, 105). Mrs. Smith further testified that appellant did not leave that room from 9:00 p.m., March 8, 1966 until around 5:00 a.m., March 9, 1966 (Tr. 97-99). Mrs. Smith claimed that although she was asleep during the very early morning hours of March 9, 1966 she would have known if appellant left the room because she was not a sound sleeper (Tr. 98-99, 104-05).

Appellant testified in his own behalf (Tr. 106-120).[3] Appellant denied committing the robbery (Tr. 107). Appellant also denied being at the gas station during the early morning hours of March 9, 1966, talking to Folks at any time, offering Folks a drink a few days before the robbery and owning a black tweed coat (Tr. 107-08). On cross-examination appellant also denied that he stopped going to the Gulf Service Station after the March 9, 1966 robbery and claimed that he continued going to this gas station as frequently after March 9, 1966 as he had prior to March 9, 1966 (Tr. 110-11). Appellant further testified on cross-examination that he was asleep in his grandmother's room at the time of the robbery (Tr. 113-14, 117-18). Although appellant had been staying with his grandmother off and on for a couple of years and called her room his home, he claimed he did not have a key to the house (Tr. 115-17). Appellant further claimed that when he came home at late hours he had to wake someone up to let him in (Tr. 116).

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[3] At a *Luck* hearing prior to appellant taking the stand, the court ruled that the Government could not impeach appellant with a prior taking property without right conviction (Tr. 72-74).

The original offense report—Metropolitan Police Department Form 251

Detective Peter F. King, assigned on March 9, 1966 to the First Precinct, Metropolitan Police Department, was called by the defense to testify (Tr. 77-78). Detective King investigated the March 9, 1966 robbery of the Gulf Service Station at 101 Massachusetts Avenue, Northwest (Tr. 78). Detective King responded to the Gulf Service Station at approximately 8:00 a.m. on March 9, 1966 and spoke with Folks about the robbery (Tr. 78). Later, during the morning of March 9, 1966 at the First Precinct-Police Headquarters, Folks again told Detective King about the robbery and at this time Detective King typed up an affidavit in support of an arrest warrant (Tr. 79, 84). Detective King also testified that the police statement of facts—Metropolitan Police Department Form 163 (Government Exhibit B) was compiled by taking the information from the affidavit in support of the arrest warrant and the original offense report—Metropolitan Police Department Form 251 (Tr. 79, 83-84). The original offense report was made out by Detective Winnifred Baytop who responded to the scene of the robbery at 3:45 a.m. on March 9, 1966 (Tr. 83-86). A copy of the original offense report was turned over to appellant and marked as Defense Exhibit A (Tr. 84-85). At the bottom of the original offense report appeared Detective Baytop's name (Tr. 85).

A little later in the trial appellant offered in evidence the original offense report (Defense Exhibit A) and requested the court's permission to read it to the jury (Tr. 123). The court *sua sponte* called counsel to the bench (Tr. 123). At the bench conference, appellant's court-appointed counsel, Myron G. Ehrlich, explained his purpose, "All I wanted to show to this jury are that some of the things he [Folks] said on that witness stand do not appear on this [original offense report]" (Tr. 124). Appellant's attorney went on to say that if he was not allowed to do

this, he would request a subpoena for Detective Baytop (Tr. 124).[4] The prosecutor replied, "If he wants to put it in evidence, I don't care. But I will have it explained by Detective King" (Tr. 124). The court then admitted the original offense report in evidence (Tr. 125).

Appellant's attorney then read the original offense report to the jury (Tr. 125-27). The pertinent parts of the report follows:

> The above complainant [Folks] reports about 3:20 a.m., 3/9/66, a Negro male entered the Frajaje Gulf Service Station [at 101 Massachusetts Avenue, Northwest] and stood around. Complainant asked this subject if he could help him and subject stated no. After standing about premises for about ten minutes this subject pulled from his left-hand pants pocket a rusty nickle [*sic*] plated revolver, believed to be .32 calibre, and told complainant You can be a dead hero, give it to me, pointing gun at complainant, who was seated in a chair in office. Complainant removed from his right-hand pants pocket $131 [*sic*] in assorted bills and subject told him to toss it over to him, which complainant did. At this point witness Fields attempted

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[4] The original offense report on which Detective Baytop's name appeared is a public record (Tr. 137). Detective Baytop's signature would appear at the bottom of the report. Appellant's attorney could have inspected this document at police headquarters prior to trial and subpoenaed Detective Baytop prior to trial. See Metropolitan Police Department General Order No. 4, Series 1963, pp. 1-2, which provides in pertinent part:

> To comply with the provisions of the District of Columbia Code [4 D.C. CODE §§ 134, 135 (1967)], departmental files consisting of the entire PD Form 251 and PD Form 253 are hereby designated the "General Complaint Files" and will constitute the public record of offenses reported to the Metropolitan Police Department.
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> * * * *
>
> Units of the department reporting offenses on PD Form 251 shall forward to the Statistical Bureau an original and two copies of that form for each offense reported . . . . *One copy of PD Form 251 will be maintained by the Statistical Bureau in the General Complaint File from which it will be drawn and shown to any person making request for the public record.* (Emphasis added.)

> to get out of chair and subject told him if he moved he would shoot him. Complainant then ordered to place his hands on the window and not to move. Subject then made his escape running across the 700 block of New Jersey Avenue, and then north in the 700 block of First Street, Northwest.
>
> L.O.F. [look out for] Negro male, 28, five-foot-nine, 170 pounds, medium complexion, clean shaven, wearing black and white tweed coat, black hat and green pants, armed with a nickle [*sic*] plated revolver. On scene, Lieutenant Shelton, Sergeant Powell, Sergeant Cox, No. 1 Precinct Cruiser 201 Baytop and Smith. Cruiser 35, Detective Sergeant Schwart and Brasey. Sergeant Kennedy CCR notified 4:20 a.m. (Tr. 126-127.)

The defense then rested (Tr. 127).

Following the close of appellant's case, the prosecutor at the bench requested permission to call Detective King in rebuttal to explain to the jury that the original offense report is a quick look-out and that everything that is told to the police officer is not put down in this report (Tr. 129). A discussion then ensued between appellant's attorney and the court concerning whether appellant's attorney could argue to the jury that Folks' testimony was inconsistent with the original offense report because Folks' testified to events on the witness stand that were not included in the original offense report (Tr. 129-133). The court felt that appellant's attorney should not make this argument since the original offense report did not purport to include everything that Folks reported to the police (Tr. 132). Appellant's attorney then requested permission to subpoena Detective Baytop because "I had no indication even ten minutes ago that Your Honor wouldn't let me argue inconsistencies in the testimony, as what I call inconsistencies" (Tr. 133). The discussion finally concluded on the following accord:

> THE COURT: What do you expect me to do now, to delay this trial a day or so while you get this [Officer Baytop]?

DEFENSE COUNSEL: No sir. I want you to permit me to argue these things which would obviate the necessity for that, to argue Officer King testified that they don't put everything down on the report. I want to argue the fact that those things are not in the report and its King's fault.

THE COURT: All right. I will permit you to argue that. Then I will permit the Government to argue from the other statements, including the grand jury statements, where they were given.

* * * *

PROSECUTOR: Your Honor, I have no objection to Mr. Ehrlich arguing what he wants to argue, everything and anything. However, to offset that argument, I want to call Detective King to explain that this 251 is not to get everything there, the main purpose of it is to get the look-out going.

THE COURT: All right. Call the detective. (Tr. 137-39.)[5]

Detective King was then called by the Government in rebuttal (Tr. 139). Detective King stated that the main purpose of the original offense report was to make an initial report and send an immediate look-out for the subject wanted (Tr. 140). Detective King further stated that he being the investigating officer obtained a more complete report of the robbery when he spoke to Folks at 8:00 a.m. on March 9, 1966 (Tr. 141, 146). Folks told Detective King at this time that he had seen appellant on several occasions prior to the robbery around the gas station and that appellant had been hanging around the gas station about forty minutes prior to the robbery (Tr. 141-42). Detective King also indicated that a follow-up report to the original offense report—Metropolitan Police Department Form 252 was prepared (Tr. 142-43). This follow-

[5] Appellant's trial counsel in closing argument argued without restriction that certain facts testified to by Folks on the witness stand were absent from the original offense report (Tr. 178-80).

up report was marked as Government Exhibit C (Tr. 143).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

The Government's evidence was sufficient to sustain appellant's conviction for robbery. Two Government witnesses unequivocally identified appellant as the armed bandit who robbed the gas station of $130; one of these witnesses had seen appellant on several occasions prior to the robbery. Appellant specifically contends that it is "inherently incredible" that a person would rob a gas station where he was well-known. However, appellant robbed the gas station when the owner, with whom he was well-acquainted, was absent. Clearly, the evidence presented a jury question.

II

Appellant only requested that Detective Baytop be subpoenaed *if* the court would not allow him to introduce into evidence a report prepared by Detective Baytop and to argue to the jury about this report. The court allowed the report into evidence and allowed appellant's attorney to argue without restriction about the report. Thus, appellant's conditional request to subpoena Detective Baytop vanished and the court did not deny appellant permission to subpoena him.

III

During the course of his vigorous closing argument, appellant's trial counsel mentioned his personal experience and opinion. In concluding his argument, appellant's trial counsel attempted to express his personal opinion about the strength of the Government's evidence, but the court interrupted him and admonished him not to argue his personal opinion. This admonishment was proper and appellant was in no way prejudiced by it.

ARGUMENT

I. The evidence was sufficient to sustain the jury verdict of guilty.

(Tr. 16-24, 52-56, 88-89, 92, 125, 127)

Appellant contends that the Government's evidence was insufficient to support the verdict of guilty.[6] The Government believes that its evidence was clearly sufficient to sustain the jury's verdict.[7]

At trial, Government witnesses Willie M. Folks and Robert Fields testified that appellant at 3:30 a.m. on March 9, 1966 entered the well-lit office of the Gulf Service Station at 101 Massachusetts Avenue, Northwest, and at gunpoint robbed Folks of $130 which belonged to the owner, Jessie Turner (Tr. 16-20, 24, 52-56). Folks, a new employee at the gas station, had seen appellant several times prior to the robbery in the gas station and had

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[6] Brief for Appellant, pp. 5-9.

[7] In reviewing the sufficiency of the evidence, this Court "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). See *Ingram* v. *United States*, 360 U.S. 672 (1959); *Glasser* v. *United States*, 315 U.S. 60 (1942); *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967).

talked to him on one of these occasions;[8] in addition, about 45 minutes before the robbery, Folks had talked with appellant who had been hanging around the gas station during the very early morning hours of March 9, 1966 (Tr. 20-23). Folks was positive that appellant was the unmasked robber (Tr. 24, 55). Fields, a friend of Folks who was at the gas station at the time of the robbery, had not seen appellant before the early morning hours of March 9, 1966, but Fields had observed appellant hanging around the gas station for an hour to an hour-and-a-half before the robbery (Tr. 55). Fields was unequivocal in identifying appellant as the unmasked bandit (Tr. 55-56). Under these circumstances, the Government's evidence was sufficient to sustain the verdict of guilty. *Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966) (the identification by the complainant of the gas station bandit was sufficient to sustain the conviction for robbery); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951) (the complainant's identification of the robber was sufficient to sustain the conviction for robbery). See also *Thomas* v. *United States*, No. 20,287, D.C. Cir., May 4, 1967 (rape victim's identification of her attacker sufficient where victim had adequate opportunity to observe).[9]

Appellant makes the more specific contention that it is "inherently incredible" that a person would rob a gas station where he is well-known,[10] and therefore, the Government's evidence was insufficient. Clearly, the Government's evidence presented a question of credibility for the jury

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[8] Interestingly, appellant, who frequently visited the gas station before the March 9, 1966 robbery, stopped his visits to the gas station after the robbery (Tr. 89, 92).

[9] A detailed description of the robber was given to the police shortly after the robbery and this description is recorded in the original offense report (Defense Exhibit A) (Tr. 125, 127). Appellant did not contend at trial that this description did not fit him.

[10] Brief for Appellant, pp. 5-9.

to decide.[11] It is true that appellant was well-known to the owner of the gas station, Jessie Turner; however, Jessie Turner was not at his gas station when appellant robbed it (Tr. 17, 88-89). Appellant robbed a new employee of the gas station when the owner, with whom he was well-acquainted, was absent. There is nothing "inherently incredible" about this. Actually, it is quite common for desperate bandits to rob business establishments where they are well-known. For example, in the recent case of *(Willie T.) Smith* v. *United States*, No. 20,389, D.C. Cir., affirmed by order January 16, 1968, Willie T. Smith, without a mask, robbed at gunpoint the proprietor of his neighborhood grocery store where he had been a customer on at least four or five occasions. This Court sustained the sufficiency of evidence against Smith which was basically the testimony of the grocer.[12] Another example is the interesting case of Harold W. Greenwell, the famous Washington bank robber. On May 26, 1964, Greenwell, without a mask, entered the Liberty Savings and Loan Association, 1829 Connecticut Avenue, N.W., and robbed teller Gail Pond of over $6,000 (Criminal Case No. 526-64). *Butler* v. *United States*, 122 U.S. App. D.C. 5, 350 F.2d 788 (1965), *cert. denied*, 384 U.S. 992 (1966). On August 15, 1966, Greenwell, an escapee from Lorton Reformatory, again unmasked, entered the same Liberty Savings and Loan Association at 1829 Connecticut Avenue, N.W., and robbed the same teller, Gail Pond, this time of approximately $2,500 (Criminal Case No. 1185-66).[13]

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[11] See *Trimble* v. *United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966) ("bizarre" and conflicting evidence for the jury's consideration); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951).

[12] See Briefs and Records, *(Willie T.) Smith* v. *United States*, No. 20,389, D.C. Cir., January 16, 1968.

[13] Greenwell was convicted of this August 15, 1966 bank robbery on January 17, 1968.

II. Appellant was not denied permission to subpoena Detective Baytop.

(Tr. 15-25, 110-11, 123-27, 129-42, 178-80)

Appellant contends on appeal that the trial court erroneously denied his request to subpoena Detective Baytop.[14] The record shows, however, that appellant only requested that Detective Baytop be subpoenaed *if* the court would not allow him (1) to introduce into evidence and read to the jury the original offense report prepared by Detective Baytop, and (2) to argue to the jury that the original offense report did not include some of the statements Folks' made on the witness stand (Tr. 123-27, 129-39). The trial court did admit into evidence the original offense report and did allow appellant's trial attorney to read it to the jury (Tr. 125-27). The trial court also permitted appellant's trial counsel to argue to the jury without restriction that certain statements made by Folks on the witness stand did not appear in the original offense report (Tr. 127-39, 178-80).[15] Thus, since the trial court satisfied appellant's demands, appellant abandoned his conditional request to subpoena Detective Baytop. The accord

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[14] Brief for Appellant, pp. 9-13.

[15] The original offense report taken by Detective Baytop shortly after the robbery corroborates many, many details of Willie Folks' testimony in court (Tr. 15-25, 125-27). There is, however, no mention in the original offense report that Folks had seen appellant on several occasions prior to the robbery including 45 minutes prior to the robbery (Tr. 125-27). Folks testified to these facts at trial (Tr. 20-24). Detective King explained in rebuttal that the original offense report was an initial report and look-out for the subject wanted, and was not intended to include everything said to the police officer on the scene (Tr. 139-40). Detective King further testified that he was the investigating officer assigned to the case and that when he interviewed Folks at 8:00 a.m. on March 9, 1966, about 4½ hours after the robbery, Folks told him that he had seen appellant on several prior occasions including about 40 minutes prior to the robbery (Tr. 141-42). Of course, appellant's own testimony corroborates the fact that Folks had seen appellant on several occasions prior to the robbery since appellant admitted frequently visiting the gas station before the robbery (Tr. 110-11).

reached between appellant's trial counsel and the trial court is best reflected in the following excerpt from the trial:

> THE COURT: What do you expect me to do now, to delay this trial a day or so while you get this [Officer Baytop]?
>
> DEFENSE COUNSEL: No, sir. I want you to permit me to argue these things which obviate the necessity for that, to argue Officer King testified that they don't put everything down on the report. I want to argue the fact that those things are not in the report and it's King's fault.
>
> THE COURT: All right. I will permit you to argue that. Then I will permit the Government to argue from the other statements, including the grand jury statements, where they were given. (Tr. 137-38.)

The above statement of appellant's trial counsel makes it clear that appellant did not want Detective Baytop subpoenaed. All appellant wanted was to be allowed to make certain arguments to the jury and this the court permitted.

III. The trial judge did not err in admonishing appellant's trial counsel during closing argument not to argue his personal opinions.

(Tr. 152, 174-89)

Appellant was represented at trial by Myron G. Ehrlich, a very able, enthusiastic and experienced Washington criminal lawyer. Mr. Ehrlich presented a vigorous defense in appellant's behalf including a lengthy closing argument to the jury.[16] During the course of this closing argument, Mr. Ehrlich placed his personal experience and opinion before the jury.[17] In concluding his argument,

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[16] Tr. 174-189.

[17] For example, Mr. Ehrlich argued:

> Now, it may be true that the police officer doesn't have to write everything down, I don't know whether they have or

Mr. Ehrlich attempted to express his personal belief concerning the strength of the Government's evidence, but the court interrupted him and admonished him not to express his personal opinion (Tr. 189).[18] It is, of course, improper for an attorney to inject his personal opinion into the trial and the court in the instant case properly restricted appellant's trial attorney from doing so. *Stewart* v. *United States*, 101 U.S. App. D.C. 51, 54-56, 247 F.2d 42, 45-47 (1957) *(en banc)*. The court did not prevent Mr. Ehrlich from making proper comments on the evidence.

The colloquy between the trial judge and appellant's trial counsel lasted approximately 15 seconds and did not prejudice appellant. Appellant's trial attorney, who was in the best position to evaluate what effect this colloquy might have had on the jury, made no request for a mistrial. Certainly, this colloquy could not have given the jury the impression that the court felt appellant was

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or [*sic*] they don't, *but it would seem to me not only as layman but as a lawyer that has been around here more than 40 years,* that one of the important things that he would write down would be this man's statement that he had just talked to him, that he knew him because he had seen him a couple nights before, and he wanted to have some drinks with him. (Tr. 179.) (Emphasis added.)

[18] DEFENSE COUNSEL: . . .

* * * *

On the contrary, on the contrary, I believe that the evidence—

THE COURT: Now, now, Mr. Ehrlich. How long have you been practicing law?

DEFENSE COUNSEL: 42 years.

THE COURT: Then you know that your opinion is not important in this case and you are not allowed to express it.

DEFENSE COUNSEL: Well, I don't know that, sir. You say I do.

THE COURT: If you don't, you ought to.

DEFENSE COUNSEL: All right. (Tr. 189.)

guilty.[19] And, of course, the jury was properly instructed on this point:

> You are not to draw any inference, nor are you to be influenced with respect to the guilt or innocence of the defendant by any ruling of this Court during the course of the trial. There is nothing that the Court has said during the course of the trial or that will be said during this charge which should carry with it any suggestion as to how the Court feels this case should be decided, because you being the sole judges of the issues of fact in this case, for me to suggest how you should decide the case would constitute a wholly unwarranted assumption of your prerogatives in the case. (Tr. 152.)

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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ALLAN M. PALMER,
CARL S. RAUH,
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[19] Appellant's reliance on *Young* v. *United States*, 120 U.S. App D.C. 312, 346 F.2d 793 (1965) is misplaced. Young represents an extreme case. The facts in the instant case are obviously distinguishable.

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